Filed 8/21/19 P. v. Hernandez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ALBERT HERNANDEZ, Defendant and Appellant.	2d Crim. No. B290557 (Super. Ct. No. 2018002368) (Ventura County)

Thirty-one-year-old Albert Hernandez (appellant) and sixteen-year-old N.F engaged in a brief fistfight over N.F.'s desire to join appellant's gang. Appellant returned home. The fight resumed when appellant, responding to N.F.'s taunts, returned to the scene and slashed N.F. with a box cutter. Appellant contended that he acted in self-defense. He was convicted by jury of assault with a deadly weapon (ADW). (Pen. Code, § 245, subd. (a)(1).)[1] He contends that the trial court abused its discretion in

[1] Unlabeled statutory references are to the Penal Code.

allowing the prosecution to impeach his testimony with proof of a 15-year-old prior conviction of ADW.

In supplemental briefing appellant asks that we remand the matter for reconsideration of his nine-year sentence. He received a two-year sentence on the ADW doubled by the finding the prior conviction was a serious felony (ADW - using a firearm; (§§ 245, subd. (a)(2), 667, subd. (e)(1),1170 subd. (h)(3)) plus an additional five years for the same finding (§667, subd. (a)).

We affirm. We remand the case solely to allow the trial court to exercise its discretion on the "five-year prior." (§§ 667, 1385.)

FACTS

On the evening of August 31, 2017, N.F. was socializing and drinking with friends at a bridge in Fillmore. He was a 16-year-old sophomore at a special education school. He testified, "I got approached and got into a fight with somebody." The fight lasted 15 to 20 seconds. He was hit and he struck the other person, who walked away and appeared to leave. N.F. remained near the bridge "because I wanted to cool down."

While leaning against a railing, N.F. was attacked from the side and fell. He did not see anyone approaching and did not challenge anyone to a fight. During the attack, N.F. did not feel slashing. Afterward, he realized he was bleeding. N.F. had four lacerations on his face and neck, and two of these were three and six inches long; he had three wounds on his abdomen, one of which was four inches long; he had an eight-inch wound on his chest and a cut on his rib cage. Three wounds required three to five surgical staples each. The injuries were not deep, consistent with use of a box cutter.

Police spoke to N.F. briefly at the scene. N.F. knew the suspect but refused to identify him, saying "[i]t's gang related"

and he was not going to "snitch" or "rat out anybody." Detectives questioned N.F. at the hospital and recorded some of the conversation. N.F. said he fought with "Stranger," an older gang member. Stranger insulted N.F.'s "little homie." N.F. became angry. A fistfight ensued. N.F. hit Stranger, cutting his right eye and nose. N.F. felt he won the fight and Stranger departed.

N.F. said, "Stranger did stab me. Stranger stabbed me, dog. And I ain't tryin' to be no snitch." He added, "me and him got in a fight . . . . I lumped his ass up, and that's when he came back later with the knife. I didn't even know that fucker had a knife on him. . . . Only a coward pulls a knife to a fistfight."

N.F. estimated that 30 minutes passed from when he fought Stranger until Stranger returned with a weapon. Detectives showed N.F. a photograph of appellant, whom he identified as the person who stabbed him. N.F. was afraid that he might be perceived as a snitch who cooperated with law enforcement.

At trial, N.F. denied telling detectives that he was stabbed by Stranger; denied ever hearing of anyone named Stranger; denied identifying appellant's photograph to detectives; denied knowing the meaning of "snitch;" denied telling detectives he is in a gang or tagging crew; denied being stabbed by a gang member; and claimed "I was drunk. I don't remember anything." He stated that he was not armed with a weapon that evening and did not see anything in the hands of the person who attacked him.

When appellant was arrested on September 1, 2017, he had injuries from a fistfight, including a cut and swelling above his eye and bruises on his face and arms. Police found a box cutter in appellant's backpack with a brownish red substance on the blade, which forensic testing proved was N.F.'s blood DNA. A search of

appellant's bedroom uncovered blood-stained clothing and N.F.'s telephone.

Appellant was 31 years old when he fought with N.F. His moniker is Stranger. Appellant's cell phone had a text message he sent after the fight; it read, "I think they snitched."

Appellant telephoned his girlfriend from jail. The call was recorded. He said, "I was just trying to scare the mother fucker and . . . he fucking rushed me. You know I was just trying to scare him that's it . . . . He was causing a fucking scene." Appellant worried that police took his clothing and other things while executing a search warrant. He said, "I know the mother fucker didn't die." He added, "all I did was beat him up but it looks bad. It looks fucking bad. It looks worse than it is you know?" He noted that he was arrested for assault with a deadly weapon and mused that "I should've just walked away" even though "this fool knuckled up and he actually . . . took fight on me you know?"

Appellant told his girlfriend, "the first time, like, when we, we're going to fight, yeah, like, he kind of, like, he busted me open." Referring to the victim as "a fuckin' snitch," appellant asked, "Why couldn't he keep his fuckin' mouth shut like . . . I been shot at, I been stabbed, I ain't fuckin' told the cops, you know?" Appellant stated that he had to respond to the victim's attack so that he would not "look[] like a bitch." Trying to assess his exposure to prison time, appellant noted his prison priors and asked, "And what if I hadn't stabbed that guy?"

At trial appellant testified that he acted in self-defense. He was hanging out under the bridge with a friend and had consumed six or eight beers when N.F. approached. N.F. asked to be initiated into appellant's gang; appellant said no. N.F.

became angry and wanted to fight. He "sucker punched" appellant.

Initially appellant did not hit back, but when N.F. "kept pushing," appellant hit back, but walked away after one minute. N.F. followed, trying to instigate a fight and prove he should be a "homie." N.F. stood outside appellant's home, screaming belligerently and calling appellant "a bitch."

When the screaming stopped, after five or ten minutes, appellant returned to the bridge to retrieve his wallet and cell phone. He took a box cutter for protection. At the bridge he grabbed his phone and N.F.'s phone too. N.F. ambushed appellant, challenged him to a fight and punched appellant.

Appellant began bleeding. He took out the box cutter. He stated, "I got on top of him and I could have continued going and I didn't. I just looked at him and I let him go, boom." Appellant ran home. Appellant considers himself the victim; he did not intend to hurt anyone. Slashing N.F. "was some mistake."

Trial was bifurcated. A jury convicted appellant of ADW and the court found the special allegations true. The court denied appellant's motion to strike the prior conviction. It sentenced him to a total of nine years, consisting of the low term of two years, doubled for the strike, plus five years for the prior serious or violent felony.

Motion to Admit Prior Crime Evidence

The prosecutor moved to admit evidence of an ADW appellant committed in 2002. In that incident, he was walking home and saw individuals flash gang signs from a car; they called him a "pussy." He went home, got a rifle and shot a man in the back. Appellant claimed the victim charged at him and he fired in self-defense.

The prosecutor argued that the prior ADW is admissible to negate appellant's self-defense claim. Defense counsel responded that the evidence is prejudicial. The court found the prior is "propensity evidence" that is "15 or more years old [and] the defendant was a juvenile." It denied the prosecutor's motion to introduce evidence of the 2002 crime as part of its case in chief. The court ruled that appellant could be impeached with his prior if he testified; however, it limited impeachment to the fact of his conviction, without underlying details.

Defense counsel asked appellant about his prior conviction on direct examination.[2] The prosecutor did not pursue it while cross-examining appellant but argued during summation that appellant's conviction reflects upon his credibility as a witness.

DISCUSSION

Use of Prior Felony For Impeachment

Appellant challenges the ruling allowing impeachment with his prior felony. Trial courts have broad discretion to admit or exclude prior convictions for impeachment; the ruling is rarely disturbed on appeal. (*People v. Hinton* (2006) 37 Cal.4th 839, 887 (*Hinton*).) The trial court did not abuse its discretion.

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[2] The prior conviction testimony was as follows:

"[Defense counsel]: Okay. I have to ask you about your past. Now, you did suffer a felony conviction back in 2002? [*sic*, the conviction was in 2003]

"[Appellant]: Yes, I did.

"[Defense Counsel]: All right. And that was for assault with a deadly weapon, correct?

"[Appellant]: Firearm.

"[Defense Counsel]: Despite that conviction is everything you said on the stand the truth?

"[Appellant]: Yes. It is the truth I recall it to be."

"By taking the stand, defendant put his own credibility in issue and was subject to impeachment in the same manner as any other witness." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.) "No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity." (*People v. Beagle* (1972) 6 Cal.3d 441, 453, disapproved on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190-1191.) "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." (Cal. Const., art 1, § 28, subd. (f)(4).) The conviction may be used "[f]or the purpose of attacking the credibility of a witness . . . ." (Evid. Code, §§ 788, 1101, subd. (c) [instances of misconduct can be used to "attack the credibility of a witness"].)

A prior felony used for impeachment must involve moral turpitude, i.e., a general """readiness to do evil""" even if dishonesty is not necessarily involved. (*People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24; *People v. Castro* (1985) 38 Cal.3d 301, 314-316 (*Castro*).) "Misconduct involving moral turpitude may suggest a willingness to lie . . . ." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) Appellant concedes that ADW involves moral turpitude. (*People v. Rivera* (2003) 107 Cal.App.4th 1374, 1382; *People v. Cavazos* (1985) 172 Cal.App.3d 589, 595 [use of a deadly weapon elevates an assault to a crime of moral turpitude].)

The court has discretion to preclude evidence of a prior felony conviction if its prejudicial effect substantially outweighs its probative value. (Evid. Code, § 352; *Castro*, *supra*, 38 Cal.3d at pp. 305-306.) The court may consider whether the prior conviction reflects on the witness's honesty; the remoteness of the

prior; the similarity between the prior and the current offense; and what effect admitting the prior may have on the defendant's decision to testify. (*Castro*, at p. 307; *People v. Clark* (2011) 52 Cal.4th 856, 931.)

Appellant chose to testify after the court ruled that his prior conviction could be used for impeachment. The court could find that appellant's conviction reflects on his credibility. Though the prior ASW is the same crime as the present case, this is not disqualifying. (*People v. Edwards* (2013) 57 Cal.4th 658, 722-724 [defendant's prior convictions for murder and burglary can be used as impeachment at his murder trial because they strongly suggest moral turpitude]; *Hinton*, *supra*, 37 Cal.4th at pp. 886-888 [defendant in a capital murder case can be impeached with prior convictions for murder, attempted murder and assault with a firearm].)

Appellant asserts that the prior was stale. The trial court acknowledged it was "15 or more years old [and] the defendant was a juvenile."[3] The conviction, though not recent, was not ""followed by a legally blameless life."" (*People v. Gurule* (2002) 28 Cal.4th 557, 607-608.) Appellant attacked a minor while in juvenile custody. He was paroled in 2009. In 2010 he was convicted of disorderly conduct (§ 647, subd. (f)); in 2012 he was convicted of misdemeanor theft and vandalism (§§ 484, subd. (a), 594, subd. (b)(2)(A)); in 2014 he was arrested in Nevada for driving while under the influence.

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[3] Soon after, the court misspoke and stated that the prior was incurred in "2013" instead of 2003. The court was aware that appellant was in his thirties at trial but was "a juvenile" at the time of the prior. At sentencing, the court noted that appellant was "a youthful offender" prosecuted as an adult in the prior ADW.

Admission of impeachment evidence did not violate appellant's federal constitutional rights. Application of ordinary rules of evidence did not infringe upon his right to a fair trial. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57-58.) The court did not act mechanistically but exercised discretion and prevented the jury from hearing that appellant went home, got a rifle and shot someone in the back to avenge an insult. The evidence of his prior conviction was elicited "in [a] very summary fashion," which was not prejudicial. (*Hinton*, *supra*, 37 Cal.4th at p. 888.)

Overwhelming Evidence of Guilt

Appellant insists he would have received a more favorable result absent any reference to his 2002 crime because "[t]his was not an open-and-shut case." We disagree. It is not reasonably probable he would have obtained a more favorable verdict had his prior felony conviction been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Castro*, *supra*, 38 Cal.3d at pp. 317-319 [improper admission of the defendant's prior conviction for drug possession was not reversable error].)

There is overwhelming evidence of appellant's guilt. He made incriminating statements in a jailhouse telephone call. At trial, appellant admitted going home, procuring a box cutter, then having a second altercation in which he was on top of N.F. Police found the box cutter in appellant's possession; it bore N.F.'s DNA. N.F. identified appellant as his attacker on the night of the attack.

The jury rejected appellant's claim that he acted in self-defense. His recorded phone call stated that N.F. made "a big old scene, calling me a bitch." The jury could reasonably infer that appellant was not defending himself from great bodily injury or death; instead, he responded to N.F.'s provocations with a weapon to save face within his community. The evidence showed

that appellant used excessive force against N.F. There was no miscarriage of justice. (Cal. Const., art. VI, § 13.)

Resentencing

The court imposed a five-year enhancement for appellant's prior serious felony. (§ 667, subd. (a)(1).) In supplemental briefing, appellant argues that the law changed after he was sentenced. As a result, the court may now exercise discretion to strike enhancements in the interest of justice. (§ 1385, subd. (a).)

Appellant asks us to remand his case for resentencing. He is correct that the new law applies to nonfinal judgments. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973; *People v. Johnson* (2019) 32 Cal.App.5th 26, 68-69.) The Attorney General agrees that appellant should be given a new sentencing hearing to allow the trial court to exercise its discretion to strike the five-year sentencing enhancement.

DISPOSITION

The case is remanded to allow the superior court to consider whether Hernandez's serious prior felony enhancement should be stricken. (Pen. Code, §§ 667, subd. (a), 1385, subd. (b).) In all other respects, we affirm the judgment.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J. TANGEMAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

John Derrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.